Supreme Court of the United States

OCTOBER TERM, 1897.

NO. 269.

THE VILLAGE OF NORWOOD,

Appellant,

v.

ELLEN R. BAKER

Appellee.

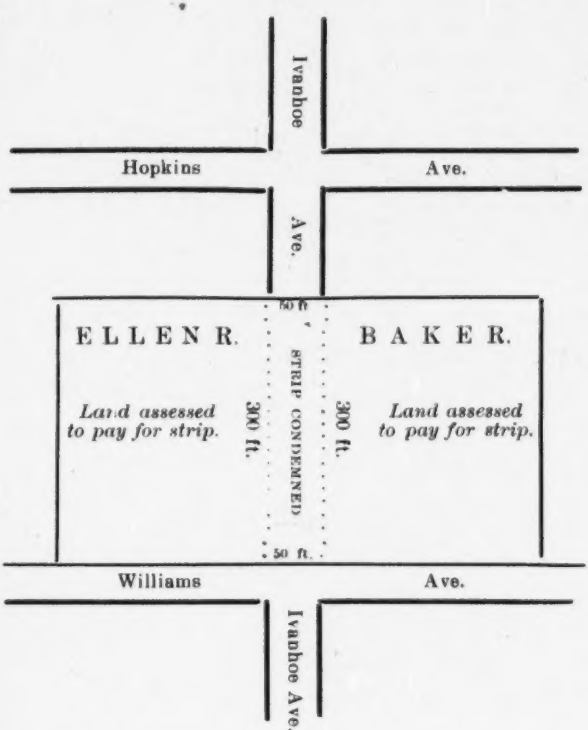
BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

I am not content with the statement of this controversy in the brief of opposing counsel, or rather with his way of putting it.

The village of Norwood, situated in Hamilton county, a municipal corporation under the laws of Ohio, desired to become the owner of a strip of ground 50 by 300 feet belonging to Ellen R. Baker, the complainant below; this

strip is indicated by the space between the two dotted lines in this diagram, which shows the situation of the real estate owned by her, and now involved in this controversy.



I insert this because the diagram in the record, page 38, unless considered in connection with the descriptions by metes and bounds, and the situation of the property, hardly conveys the right idea of the situation.

In December 1891, the village began an action in the Probate Court of Hamilton County, Ohio, against complainant to assess the value and condemn this strip shown between the dotted lines, and to take it for its own purposes.

Municipal corporations such as the village of Norwood are invested with authority to do this in Ohio by section 1692 of the Revised Statutes, which gives a village generally the power to appropriate private property for the use of the corporation; and by section 2232 which provides that a village may appropriate, enter upon and hold real estate within its corporate limits for certain public purposes.

Sections 2233 et seq. provide a statutory procedure in eminent domain, in the way of a declaration by council of a determination to appropriate and the beginning of an action in the probate court to assess the valuation of the real estate proposed to be taken, a form of trial by a jury, the ascertainment of the value of the real estate proposed to be taken, and the election by the village council to take it at the so ascertained value, and the payment of the money.

These statutes are entirely similar to such legislation in most of the states.

In this case the village of Norwood, observing the usual and statutory formalities, began an action in the Probate Court of Hamilton county to condemn and acquire title to the property referred to. There was a verdict by a jury fixing the value of the strip 50 by 300 feet, at $2,000. The village thereupon took the property and paid my client the money.

Then the village did the thing that is complained of in

this action, and out of which this controversy arises. Having taken the property and paid the $2,000 for it, the village added to this $2,000 the costs of the probate court in the condemnation suit, the fees of the counsel who brought and conducted it, and of expert witnesses as to value, certain expenses of advertising, printing and sundry other charges, and levied an assessment for this total amount, $2,218.58, upon the remaining adjacent abutting real estate of Ellen R. Baker, located on either side of the condemned strip so taken by the village, levying an assessment by the front foot upon the property of the complainant facing the strip so taken upon both sides.

The assessment being made payable to and in favor of the village, the effect of it was that the village, by this attempted assessment, would get back from Ellen R. Baker the $2,000 paid her for the land, and the various costs of the condemnation suit, counsel fees and expert fees, advertising, printing and other charges added.

Any right in the village of Norwood to make any such assessment, if right it has, must be found in the following sections of the statute.

"Sec. 2263: When the corporation appropriates, or otherwise acquires, lots or lands for the purpose of laying off, opening, extending, straightening, or widening a street, alley, or other public highway, or is possessed of property which it desires to improve for street purposes, the council may assess the cost and expenses of such appropriation or acquisition, and the improvement, or of either, or of any part of either, upon the general tax-list, in which case the same shall be assessed upon all the taxable real and personal property in the corporation."

"Sec. 2264: In the cases provided for in the last section, and in all cases where an improvement of any kind is

made of an existing street, alley or other public highway, the council may decline to assess the costs and expenses in the last section mentioned or any part thereof, or the costs and expenses or any part thereof of such improvement, except as hereinafter mentioned on the general tax-list, in which event such costs and expenses, or any part thereof which may not be so assessed on the general tax-list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained; and the assessments shall be payable in one or more installments, and at such times as the council may prescribe; * * * "

On a demand from the village, of payment, the complainant below declined to pay this assessment; thereupon the clerk of the village of Norwood, by virtue of section 2265 which authorizes such a course to enforce the collection of assessments, certified such assessment to the county auditor of Hamilton county, who proceeded to enter the assessments against the real estate of the complainant so assessed upon the general county tax duplicate, and certified the same to the county treasurer, who proceeded to collect them with and as taxes are collected, the assessment becoming, like taxes, a lien upon the real estate.

The complainant brought this action in the court below to enjoin the collection of this assessment, setting forth the facts in detail in her complaint, record pages 1 to 6 inclusive, alleging that the collection of this assessment was un-

constitutional, and therefore illegal; averring it was in effect and fact sheer confiscation of her property by the village.

The right to maintain an action by injunction to prevent the collection of illegal assessments in Ohio is given by sec. 5848. The court below sustained the bill and enjoined the assessment. The village now appeals.

The purpose for which the village of Norwood desired to acquire this strip of real estate, I respectfully submit, cuts no figure; whether it was for a street, or a school house, an engine house or water-works station; the principle involved is precisely the same.

If the village of Norwood had demanded of Ellen R. Baker that she present to the village this strip of ground 50 feet by 300 feet, she had better submitted to the demand and given up her property. It would have been less expensive.

If the village of Norwood had entered upon her property and taken it by force, refusing her payment therefor, she had best submitted and allowed her property to be so taken from her. It would have been less expensive.

Because taken under claim of color of law, and under claim that a statutory curriculum has been followed, it is none the less apparent that whatever the method pursued, it means simply and only that her property is to be taken from her without compensation, with an added expense put upon her of the costs incurred by the village in so taking it from her.

Can it be done?

This is the very simple question that is now presented for solution, and is the entire controversy.

I respectfully submit that the attempt made to take the complainant's property by condemnation proceedings, and then to force her to foot this bill by assessment proceedings on her remaining abutting property, is in violation of the fifth amendment of the Constitution of the United States, which provides "Nor shall private property be taken for public use without just compensation."

And is in violation of section one of the fourteenth amendment which provides "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And is in violation of the bill of rights of the Constitution of Ohio that provides that "Private property shall not be taken for public use without compensation therefor made in money, without deductions for benefits to any property of the owner."

THE LAW OF THE CASE.

In November, 1885, the city of Toledo by its common council undertook to appropriate the property of one Scott and another by appropriating and assessing ordinances, exactly as the village of Norwood attempted in the case at bar.

An action was begun in the U. S. Court by Scott against the city to enjoin the collection of the assessment of the costs and expenses, which included the value of the land of complainant, upon the complainant's remaining land.

That action was tried to the late Mr. Justice Howell

E. Jackson, who was then the judge of the United States Circuit Court in this circuit. The question involved in that case is identical with this.

The opinion of Mr. Justice Jackson in that case covers the entire controversy here.

The learned court who tried this cause below, as it will appear from the opinion of Judge Sage, see record pages 26-28, after a statement of the case, rests his judgment upon the opinion of Judge Jackson in Scott v. The City of Toledo, 36 Fed. Rep., 385.

For me to attempt to debate in this brief the question that Judge Jackson so lucidly and with so much learning discusses and decides in the Scott case, would be for me to attempt to clothe in language other than his, the statement of principles that governed his judgment and moved his decision in that cause.

I would not undertake such a task. No argument that I could make, would present to this court that which ought to be said in behalf of my client's cause, as does the opinion of that learned judge.

I therefore quote for the convenience of this court lengthily from the opinion, and submit it in support of my contention that it is not possible for any municipality, under the guise of statutory authority, to take even by indirection private property without compensation, under the plea that there has been a "due process of law."

Judge Jackson, beginning upon page 387, says:

No question is made as to the power and authority of the common council of Toledo, under the constitution and laws of Ohio, to appropriate private property for the pur-

pose of laying out and opening streets, which may be deemed necessary or convenient for the public use, upon making just compensation to the owner of the property so taken. To effectuate such appropriation, where the parties cannot agree upon the price of the property taken, or sought to be acquired, the city must apply to certain designated courts for a condemnation of the land wanted, and to determine the owner's compensation therefor and his damage to the remaining property, which are to be ascertained and assessed by a jury. The details of such proceedings in court are not involved in this case, and need not be specially noticed. The city of Toledo, under the ordinance in question, had the undoubted right to apply to the courts of the state for a condemnation of the property sought to be appropriated for the extension of Woodruff avenue, and to have fixed and ascertained, by a report of a jury, the compensation and damages that should be paid the owners therefor. But in making such application to the court there is no provision of the law allowing or authorizing the owner of the property sought to be taken to inquire into or contest the validity of such an assessment as that made by the ordinance in question. Such court proceedings would relate only to an ascertainment of the compensation and damages to be allowed the owner upon the condemnation of his property. In ascertaining the compensation and damages that should be awarded the owner of the property sought to be appropriated to such public use, the constitution of the state requires such compensation to be "first made in money, or first be secured by a deposit of money;" and that it "shall be assessed by a jury, without deductions for benefits to any property of the owner." Article 1, sec. 19. And by article 13, sec. 5, of said constitution, it is further provided that "no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or first secured by a deposit of money, to the

owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law." Under these provisions of the organic law of the state, it seems clear that no benefits which might result to complainants or to their adjoining and abutting property from the laying out, opening and extension of Woodruff avenue could be lawfully estimated in reducing or offsetting the compensation to which they would be entitled for the appropriation of their property to the purpose contemplated by said ordinance.

For so much of their property as the city needed for the proposed extension of Woodruff avenue they were entitled, by the requirements of the constitution, to full compensation in money, "without deduction for benefits to any property" belonging to them resulting from such proposed improvement. The general assembly, in the organization of cities and incorporated towns or villages, as they were empowered to do by general laws, could not confer upon such municipalities or the courts any authority to disregard these provisions of the constitution relating to the manner in which compensation for private property taken or appropriated for public use should be ascertained and paid for. The statutes of the state relating to the right of cities and incorporated villages to appropriate private property for streets or other public purposes, or conferring upon them power and authority to levy taxes or make special assessments for local improvements, should, therefore, be read and interpretated in the light of these provisions of the fundamental law. The authority under which the assessment made in and by the ordinance in question is sought to be sustained, is found, as defendant's counsel insist, in sections 2263, 2264, 2267, and 2271 of the state statutes, which provide as follows:

"Sec. 2263. When the corporation appropriates or otherwise acquires lots or lands for the purpose of laying

off, opening, extending, straightening, or widening a street, alley or other public highway, or is possessed of property which it desires so to improve, the council may assess the cost and expenses of such appropriation or acquisition, and of the improvement, or of either or of any part of either, upon the general tax-list, in which case the same shall be an assessment on all the taxable real and personal property in the corporation.

"Sec. 2264. (as amended April 20, 1881.) In the cases provided for in the last section, the council may decline to assess the costs and expenses therein mentioned, or any part thereof, except as hereinafter mentioned, on the general tax-list, in which event such costs and expenses, or any part thereof which may not be so assessed on the general tax-list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion of the benefits which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained; and the assessments shall be payable in one or more installments, and at such times as council may prescribe." 78 Ohio Laws, 259.

"Sec. 2267. No public improvement, the cost or part of the cost of which is to be specially assessed on the owners of adjacent property, and no order appointing assessors of damages or confirming their report, shall be made without the concurrence of the council, and it shall be essential that two-thirds of the whole number of the members elected to the council concur, unless two thirds of the owners to be charged petition in writing therefor."

"Sec. 2271, (as amended May 4, 1885.) In cities of the first class, and in corporations in counties containing a city of the first grade of the first class, the tax or assessment specially levied or assessed upon any lot or land for any improvement shall not, except as provided in section twenty-two hundred and seventy-two, exceed twenty-five per centum of the value of such lot or land after the improve-

ment is made, and the cost exceeding that per centum shall be paid by the corporation out of its general revenue; and, except as provided in section twenty-two hundred and seventy-two, there shall not be collected of such assessment in any one year more than one-tenth of such value of the property on which the assessment is made; and in cities of the third grade, first class, said tax or assessment shall not exceed twenty five per centum of the value of such lot or land after the improvement is made; and whenever any street or avenue is opened, extended, straightened or widened, the assessment for the cost and expense thereof shall be assessed only on the lots and lands bounding and abutting on said street or avenue so improved: provided, that nothing in this section contained shall apply to any improvement ordered commenced, or completed prior to the passage of this act." 82 Ohio Laws, 260.

In connection with this and other sections of the statutes relating to the subject of municipal improvements, counsel for the city of Toledo cite and rely upon the case of *Cleveland* v. *Wick*, 18 Ohio St., 303, in which the Supreme Court of Ohio, construing the constitution and statutes of the state, held that a municipal corporation had authority to levy an assessment upon lands fronting on a street, to reimburse the corporation for the amount of compensation paid the owner for his other land taken for the street, and for expenses incurred by the city in its improvement as a highway, and that such action was not in violation of the constitutional provision requiring full compensation in money to be paid the owner "without deduction for benefits." In that case it will be noticed, the appropriation of and payment for the property, and the assessment to reimburse the city for its expenses and outlays thereby incurred, were separate, distinct, and disconnected acts. Some time after the property had been condemned, and the owner paid therefor "without deduction for benefits," the city of Cleveland made a front-foot assessment on all the property abutting on the street including that of the party whose property had been previously appropriated, to reimburse the city for

its expenses in laying out and completing the improvement of such street. Its action was sustained, as not being in violation of the constitutional provision requiring the payment of compensation "without deduction for benefits." But in the present case, the ordinance in question does not propose to follow the course pursued by the city of Cleveland. It "does not contemplate the payment of a single penny out of the city treasury" for the property of complainants which it is proposed to appropriate for the public use; on the contrary, the ordinance and assessment therein made expressly provide that "the cost and expenses incident to and resulting from the appropriation, together with all expenses of laying off, opening, and extending and widening and straightening said street, shall be assessed upon the lots bounding and abutting upon said Woodruff avenue," between the designated points. By section 2249 of Ohio Statutes the costs occasioned by the inquiry and ascertainment of the owner's compensation for property appropriated are required to be paid by the corporation; but under this ordinance and assessment, the owners of the property proposed to be taken are required to pay such costs. By the provisions of the constitution the owners are entitled to be paid full compensation in money for the value of their property appropriated, which includes damage to their remaining property, "without deduction for benefits to any property;" but under the actual operation of the ordinance and assessment in question, the complainants are required to pay in full for their own property appropriated to the public use of the city. The city proposes to acquire the complainants' property "without the payment of a single penny out of its treasury," and without entering into any obligation involving the expenditure of money out of the general or other funds of the city. By section 2271 (as amended May 4, 1885), it is provided that special assessments levied or assessed upon any lot or land for any im-

provement shall not (except as provided in section 2272) exceed twenty-five per centum of the value of such lot or land after the improvement is made; but by the ordinance and assessment under consideration the special assessment made on the property of complainants, as shown by the agreed statement above quoted, largely exceeds this limitation Again, by section 2283 it is provided that, "so far as practicable under the provisions of this title, regard must be had, in making special assessments, to the probable benefits to the property assessed." The ordinance and special assessment in this case entirely disregard that requirement of the law, which appears to have been observed in *Cleveland* v. *Wick*, *supra*. Again, by section 2286 it is provided that "the owner shall not be liable, under any circumstances, beyond his interest in the property assessed at the time of the passage of the ordinance or resolution to improve;" but in the present case the front-foot assessment on the remaining property of complainant Scott will amount to $1,500 or $2,000, while the lot on which it is assessed does not exceed in value the sum of $700. It may well be doubted whether the decision of the supreme court of Ohio in *Cleveland* v. *Wick*, 18 Ohio St., 303, will sustain such a proceeding as the scheme devised by the common council of Toledo for acquiring the property of complainants without expense to said city. This court is inclined to the opinion that the present is, in many essential particulars, distinguishable from the case of *Cleveland* v. *Wick*, and that its proper determination is not controlled by that decision, even considering the questions here involved alone under the constitution and laws of Ohio. The decision of the Supreme Court of Ohio in *Cleveland* v. *Wick*, in its construction of the state constitution and statutes, is, of course, conclusive on this court upon the question there represented; but whether that goes to the extent of sanctioning a procedure on the part of the municipalities like the one in question, designed and in-

tended, in advance, to make the owner of the property pay for its appropriation to public use, admits of serious doubt and question.

But the questions raised and involved in the present case do not depend alone upon the proper construction of the constitution and statutes of Ohio. It is urged on behalf of complainants that, even admitting the constitution and laws of the state, as construed in *Cleveland* v. *Wick*, or otherwise, authorize such an ordinance and assessment as the one here involved, such a proceeding is in violation of that provision of the fourteenth amendment to the constitution of the United States which declares: "Nor shall any state deprive any person of life, liberty, or property without due process of law." It is claimed that the ordinance and assessment in question, if sanctioned by the statutes and constitution of Ohio, is "without due process of law." This, of course, presents a federal question, which must be settled and determined by subjecting the Ohio statutes and constitution, and the proceedings of the common council of Toledo here called in question, to the test of the requirements of the constitution of the United States as embodied in the fourteenth amendment.

Counsel for complainants, on this branch of the case, submit for consideration, upon the facts, two leading and general questions of law:

"(1)—May a municipal corporation appropriate private property for the purposes of a public highway, and compel the owner thereof to repay to the corporation, by an assessment upon his remaining property, not only the entire amount which it has paid him for the property appropriated, but also the costs and expense of ascertaining that amount, and the damages resulting to such remaining property from the taking of the property appropriated?

(2) May private property be appropriated for public uses, and a charge levied to pay therefor, without affording the person whose property is to be charged a time,

place, or tribunal where he may be heard, before the liability for such charge is finally established, and the amount thereof definitely fixed."

Upon the first proposition it is insisted on behalf of complainants that compensation for private property taken for public uses is an essential element of that "due process of law" without which the citizen can not be lawfully deprived of his property. For the defendant it is claimed that "the fourteenth amendment does not prohibit the taking of private property by a state without compensation;" in other words, that the appropriation of private property for public use, without compensation to the owner, is not depriving him of his property "without due process of law." Counsel for defendant further say that, "even if 'due process of law' be held to require compensation, the kind of compensation may still be determined by the state, and, in the absence of express constitutional provision to the contrary, the property may be compensated for in special, benefits, and it is clearly within the province of the state to provide for estimating this compensation in any manner which involves 'due process of law',—that is, notice and a hearing." We need not pause to consider this latter proposition. It is not material to the present case. It suggests a question not here involved, because it clearly appears from the pleadings, exhibits, and agreed statement of facts that no "special benefits" will inure to complainants from the appropriation of their property, but, on the contrary, that it will result in damage to their remaining property. It would be an anomaly to say that property is specially "benefited" by the same act which damages it. A further reason for not discussing this last suggestion of defendant's counsel as to the right of the state to determine the kind of compensation that shall be awarded the owner for property taken for public use, is found in the fact that the action of the common council of Toledo herein called in question, as counsel

for defendant admits, is not an attempt to pay for the property to be appropriated by the benefits resulting to other property from the appropriation. If such had been the true character of the proceeding, it would clearly violate the provisions of the state constitution, and, independent of the federal questions involved, would entitle complainants to enjoin its enforcement. The single question is therefore presented, whether, in the taking of private property for public use, "due process of law" requires that compensation shall be made to the owner for the property so appropriated. In other words, may a state, or any subordinate division thereof, since the adoption of the fourteenth amendment to the constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does "due process of law," without which the citizen cannot, under this fourteenth amendment, be deprived of his property by the state, involve as a necessary and essential ingredient the payment or the making of compensation for private property appropriated to public use? This precise question has not yet been passed upon, either by the Supreme Court of the United States or the state courts, so far as we have been able to discover, and it must therefore be considered and determined upon the general principles applicable to the subject.

No attempt will be made to define the exact scope of the terms, "due process of law". No court has yet succeeded in giving to these words an exact definition applicable to all the varied cases in which they may be involved. The supreme court has said (*Davidson* v. *New Orleans*, 96 U.S. 104) that, instead of attempting to define what constituted "due process of law", it was wiser, in ascertaining the intent and application of such an important phrase in the federal constitution, to adopt the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, and thus, by actual application, give to the words

their proper meaning. In a general sense "due process of law" is identical in meaning with the phrase, "law of the land", as used in the constitutions of the several states. Cooley, Const. Lim. 432. As applied to the appropriation of private property for public uses under the power of eminent domain, "due process of law" clearly does not mean mere legislative enactments, nor simple compliance with the forms of law, nor even constitutional provisions, if they be inconsistent with previously established legal rights. Thus, in Cooley, Const. Lim. 433, it is said:

"That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense."

And, again, (at p. 435:)

"The principles, then, upon which the process is based, are to determine whether it is due process or not, and not any considerations of mere form * * *. When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules which pertain to forms of procedure merely * * *. 'Due process of law,' in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

To the same effect is the language of the supreme court in *Davidson* v. *New Orleans*, 96 U. S. 102, where the court, speaking by Mr. Justice Miller, after explaining the reasons why the phrase "law of the land", as used in *magna charta*, was not directed against the enactments of parliament, proceeds to say:

"But when, in the year of grace 1866, there is placed in the constitution of the United States a declaration that

'no state shall deprive any person of life, liberty, or property without due process of law,' can a state make anything due process of law which, by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law within the meaning of the constitutional provision."

In this case of *Davidson* v. *New Orleans*, 96 U. S. 107, Mr. Justice Bradley said:

"If a state, by its laws, should authorize private property to be taken for public use, without compensation, * * *. I think it would be depriving a man of his property without due process of law * * *. I think, therefore, we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law, when a citizen is deprived of his property; and that in judging what is 'due process of law', respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law'."

In the *Kentucky Railroad Tax Cases*, 115 U. S. 331, 6 Sup. Ct. Rep. 57, this language of Mr Justice Bradley is quoted with approval by the supreme court. It is a fundamental principle of the common law, established and well settled before the adoption of the federal constitution, that the proper and lawful exercise of the sovereign right of eminent domain involves these two essential elements, viz., that the property must be taken for the public benefit or for public purposes, and that the owner must be compensated therefor.

The exercise of the power of eminent domain is, in legal effect, nothing more than an enforced sale, for the public benefit, at a fair price, to be ascertained in some proper mode, and to be paid the owner for the property so appropriated. This long and firmly established principle hardly requires any discussion or citation of authority in its support. It is thus clearly and forcibly expressed by one of the earliest and ablest law writers:

"So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man or set of men to do this without consent of the owner of the land. * * * In this and similar cases the legislature alone can, and indeed, frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform." Cooley, Bl. bk. 1, p. 137.

In the same work, (book 2, p. 35, note), on the subject of "Ways," it is said:

"A public way is established either by the dedication of the owner of the land or by an appropriation of the land for the purpose by the sovereign authority, under what is called the 'right of eminent domain.' When this right is exercised, it must be in pursuance of some express legislative authority which prescribes the formalities, and compensation must be made to the owner."

So, too, in Mills Em. Dom., sec. 1, it is said on this subject:

"The annals of all nations enjoying a constitutional gov-

ernment, and of many despotic nations, show that the moral sense of mankind requires such compensation. In the absence of provisions in the constitution, the courts have considered that the principle was so universal and fundamental that laws not recognizing the right of the subject to compensation would be void."

These well recognized principles, vital to the security, and essential to the protection, of the citizen against the arbitrary exercise of power on the part of the government, were in full force at the adoption of the constitution of the United States. They were not, however, fully recognized in that instrument as originally adopted. The fifth amendment, providing that private property should not be taken for public use without just compensation, was accordingly required for the better security of private property against the power of government. This amendment to the constitution which recognized and secured to the citizen, as a fundamental principle, the right to compensation for private property taken for public use, was intended as a limitation upon the federal power. The first ten amendments to the constitution recognized and secured to all citizens certain rights, privileges and immunities essential to their security. The fifth amendment, operating only as a limitation upon the powers of the general government, fell short of giving to the citizen the full protection to which he was entitled in respect to his life, liberty, and property, so far as state action was concerned. It imposed no prohibition or limitation upon the power and authority of the states in dealing with the life, liberty and property of the citizen. They were left to the restraints of their several constitutions and respective laws on these subjects. So far as the states were concerned, citizens of the United States were thus left without adequate protection and security in their persons and property. The fourteenth amendment was adopted to remedy and correct this defect in the supreme organic law of the land. It involves no forced or unreasonable construction to hold that this four-

teenth amendment, as applied to the appropriation of private property for public uses, was clearly intended to place the same limitation upon the power of the states which the fifth amendment had placed upon the authority of the federal government, and as Judge Cooley well remarks:

"Of these amendments it may be safely affirmed that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the states the surrender of no power which any free government should ever employ."

Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the constitution, it seems clear that since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states can not now lawfully appropriate private property for the public benefit, or to public uses, without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the sub-ordinate agencies of the state, and whether done directly by taking the property of one person and vesting it in another, or the public, or indirectly, through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another, the compensation to which he is entitled, would be wanting in that "due process of law," required by said amendment. The conclusion of the court on this question is, that since the adoption of the fourteenth amendment, compensation for private property taken for public uses, constitutes an essential element in "due process of law," and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution. There is no

difference in principle between the case put by Mr. Justice Miller, as an illustration, in *Davidson* v. *New Orleans*, 96 U. S., 102, viz., the taking property from A. and vesting it in B., and the taking of property from an individual and vesting it in the public. "Due process of law" is equally wanting in both cases; in the latter case, because such a taking, without making compensation to the owner, is nothing short of legalized robbery, or confiscation for the benefit of the public. If therefore the statutes of Ohio, whether in harmony with the state constitution or not, authorize the city of Toledo to appropriate the property of complainants for the purpose of a public highway, and to do this in a way which will not only exempt it from the duty and obligation of compensating them for the property taken, but impose upon complainants themselves, under the form of an assessment by the foot front, the burden of compensating themselves or of returning to the city all they may be entitled to receive as compensation for their property, such statutes are wanting in that "due process of law" required by the federal constitution; and the attempted proceedings had thereunder by the common council of Toledo are void, so far at least, as said assessment is concerned.

In the case of Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226, this court, on page 238 of its opinion, approves the reasoning and conclusions of Judge Jackson in Scott v. City of Toledo, 36 Fed. Rep. 385-396, and quotes at some length from his opinion, and in that same connection, upon page 239, this court refers with approval to the judgment of Judge Sage in this very case at bar, Baker v. Village of Norwood, 74 Fed. Rep., 997. This would seem to be decisive.

It is urged, however, by counsel in his brief that section 5848 of the Revised Statutes of Ohio gives one an oppor-

tunity to have determined by injunction in a trial in the local courts, the legality of the assessment, and that therefore this is in some way a due process of law.

But if a man's property is taken from him by condemnation proceedings, and the money so paid him in such proceedings is attempted to be taken from him by assessment under another statute, such assessment proceedings cannot be said to become legal because he whose property is thus assessed is given leave by statute to maintain an action in injunction by which he may legally try the question as to whether or not such assessment is legal and valid.

The forum created by section 5848 of the Revised Statutes of Ohio cannot be said to exclude the right of a citizen of Ohio to go into the federal court, and there litigate the constitutional questions involved in the taking of his property without compensation. The purpose of this section was only to authorize a proceeding by injunction, for without it the only remedy a tax-payer would have to contest an illegal assessment would be to pay it under protest and then bring an action to recover the money in a suit against the county treasurer.

The federal court furnishes a proper forum where a citizen may challenge the right of a municipality to confiscate his property, and in such action brought in such a forum it is no answer to say that his property has been confiscated by due process of law, because the state law under which the municipality assumes to act, provides a forum in which the citizen may undertake to redress his wrong by an action for injunction if he sees fit to appeal to it.

Nor did Judge Jackson, after his decision in the Toledo case, sustain a similar assessment to the one herein contested, as urged by counsel in his brief, pages 8 and 9, referring to Murdock v. The City of Cincinnati, reported in a local reporter. What Judge Jackson held in that case was, that where a municipality brought a suit to collect an assessment instead of certifying it to the county auditor and treasurer for collection as if a tax, that such suit afforded a tax-payer resisting the payment of the assessment, an ample forum in which to contest its validity. And that so trying such a question in such a forum, he must abide the decision of that forum.

For if, in a case like the one at bar, a citizen resisting the payment of an assessment, were held to pay it by a local court, and this should be sustained by the Supreme Court of Ohio, he would still have the right to come to this court on error and have the constitutional questions determined, if it were such a case as this, as to whether or not his property could be confiscated without compensation, and without due process of law, and this notwithstanding a statute in Ohio and the Supreme Court too declared that it could.

Returning to a consideration of the brief of counsel as justifying assessments, such as the one at bar, counsel cite three cases decided by the Supreme Court of Ohio, the first of which, Cleveland v. Wick, 1 Ohio St., 304, is examined and reviewed by Judge Jackson in Scott v. City of Toledo, supra.

Of Caldwell v. The Village of Carthage, 49 Ohio St., 334, which he likewise cites, Judge Sage in his opinion in the case, 74 Fed. 997, says the following, on page 999:

"It was held by the Supreme Court of Ohio in Caldwell v. Village of Carthage, 49 Ohio St., 334, that where land is appropriated for a street improvement, an assessment by the foot front of the property bounded by and abutting upon the imporvement, to pay the cost thereof, is not in violation of section 1 of the fourteenth amendment of the constitution of the United States. There the specific objection was that no preliminary resolution declaring the necessity of the improvement which the council of the village was required to pass, and to give notice of and publish as provided in section 2304 of the Revised Statutes, was adopted by the council, and consequently no publication was made, nor was there any service of notice of such resolution. The supreme court held that the section did not apply to the condemnation of private property for opening, extending, straightening, or widening a street. It does not appear that the general question of constitutional power which is presented in this case was presented to the court in that case, or was considered."

The other case cited by counsel, Crumbaugh v. Cincinnati, 29 Ohio St., 69, is not different from the two that are referred to by Judges Jackson and Sage in their opinions.

But assuming that the Supreme Court of Ohio has undertaken to decide and has decided that a municipality in Ohio may seize a man's property with one hand and take from him the money with which to pay for it with the other. The fact that such a proceeding was broadly authorized and warranted by statute and confirmed by the Supreme Court of Ohio, would not constitute due process of law, or prevent in any degree or way, the right of the federal court

in this action to say whether or not such a proceeding of confiscation was constitutional or tolerable.

Due process of law does not mean alone the enactment of statutes by a legislature. It means more than a special act authorizing a deprivation. It means the law in its regular course of enactment, interpretation and administration through the courts of justice.

Clark v. Mitchell, 64 Mo. 564;

Atchison Etc. R. R. Co. v. Vaty 6 W. L. B. 37;

Taylor v. Porter, 4 Hill (N. Y.) 140;

Hock v. Henderson, 4 Dev. (N. Car.) 15;

Jones v. Perry, 10 Yerg. (Tenn.) 59.

In re Ziebold, 19 Repr. (U. S. Cir.) 742, it was held that due process of law had a broader meaning than the process prescribed by act of a legislature. That such a construction would render a constitutional guarantee mere nonsense. That this would mean that no state should deprive a person of life, liberty or property unless the state elected to do so. That the terms "due process of law" and the "law of the land" have a broader and more comprehensive meaning, originating in Magna Charta itself, and operating on every branch of the civil government.

In Stuart v. Palmer, 74 N. Y. 183, it was held that this constitutional limitation extended to executive and administrative, as well as to judicial proceedings.

Counsel cites three decisions of this court. Why they are cited by him as authorities in support of his contention,

I do not understand. Two of them are authorities against him, I respectfully submit, and one is not in point.

In Fallbrock Irrigation Dist. et al v. Bradley et al, 164 U. S., 112, this court held that the provision of the fourteenth amendment regarding the taking of private property is a prohibition against the state, and does not apply to the taking of the property of one citizen by a corporation other than municipal or another citizen. So, too, was it held in United States v. Cruikshank 92 U. S. 542-554. But in each of these cases this court clearly points out the distinction and difference between this and a state taking private property.

The case of the C., B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, I have already referred to. As I have said, the opinion of Mr. Justice Jackson in Scott v. City of Toledo, 36 Fed. Rep. 385, and the opinion of Judge Sage in this very case, Baker v. The Village of Norwood, 74 Fed. Rep. 997, are quoted with approval.

It holds that the prohibition of the fourteenth amendment refers to all the instrumentalities of the state, legislative, executive and judicial. That in determining whether or not a citizen has been deprived of his property without due process of law, regard must be had to substance, and not to form.

And that, however a state court might interpret state statutes, any scheme that under the guise of law deprived a citizen of his property, though confirmed by the courts of the state of final authority, if contrary to the constitution, should not be sustained, and relief would be granted by the federal court. I cite this case as sustaining every proposition of law for which I contend in this hearing.

In no aspect can it be considered an authority supporting any of the contentions of the counsel for the appellant.

The other case cited by the learned counsel is that of Bauman v. Ross, 167 U. S. 548 that, I respectfully submit is not in point at all. That case holds that where an act of congress, operative in the District of Columbia, touching its highways, provided a jury or commission or tribunal, that in levying assessments for the construction of highways in the District of Columbia, on notice to the property holder examined and took into consideration the damages or benefits done to the property adjacent to the highway about to be built, and thereupon deferring to these, fixed the assessments for the construction of the highway upon adjacent property, each in its proper proportion, such a law was not unconstitutional. But that is not the case at bar, for we are concerned with no such question.

The only question here is, as to whether or not under form of any statutory law in Ohio, the village of Norwood may, under its cover and by its authority, compel one of its citizens to stand and deliver up her property, and so delivering it compel her to pay, in addition thereto, the cost of the equipment of the force that assumes charge of and conducts the expedition.

Can the property of a citizen be absolutely confiscated without any remedy she may invoke to give her redress, and can such a taking of her private property for public use, be justified, not only without compensation, but with the expenses of the taking added?

I deny that this is possible, even if attempted to be done under color of law—that it can be done no more by

indirection than it can directly,—for this court has said, * * * "In determining what is due process, regard must be had to substance, and not to form." 3 syllabus, 166 U. S., 226.

This court has said, too, in this same case, C., B. & Q. R. R. Co. v. Chicago, 166 U. S. 241, "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

And in this same case this court has also said, page 235:

"It is proper now to inquire whether the due process of law enjoined by the fourteenth amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state."

"In Davidson v. New Orleans, above cited (96 U. S. 97) it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the fourteenth amendment. See also, Missouri Pac. Ry. Co. v. State, 164 U. S. 403, 417, 17

Sup. Ct. 130. Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three coordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated, not as an exertion of legislative power, but as a sentence,—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty', Mr. Broom, in his work on Constitutional Law, says, 'is that of enjoying private property without undue interference or molestation.' Page 228. The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrolable power over the private fortune of every citizen.'

But if, as this court has adjudged, a legislative enactment, assuming abritrarily to take the property of one individual and give it to another individual, would not be due process of law, as enjoined by the fourteenth amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private

property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use, means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against he owner, even if he be admitted to defend, can not convert the process used into a due process of law, if the necessary result be to deprive him of his property without compensation."

See also the opinion of Mr. Justice Earl, in Stuart v. Palmer, 74 U. S., 183, which was expressly approved by Mr. Justice Field, in the Railroad Tax cases, 13 Fed. Rep., 753, and which latter opinion was approved by this court in Spencer v. Merchant, 125 U. S., 351-358.

It is sufficient to conclude with these expositions of the law and resting upon them, abide the issue.

FINALLY.

The claim is made by the counsel for the appellant that in some way the complainant below may not enjoin the collection of this assessment upon a principle of estoppel. The burden of this claim is that, because the village council passed an ordinance declaring its intention to condemn complainant's strip of ground 50 by 300 feet for the purpose of subsequently building a street upon it, and thereupon insti-

tuted proceedings in the Probate Court of Hamilton county to condemn the complainant's property and acquire title to it by the exercise of eminent domain, and the complainant, received the money which was the purchase price of her land that the court and jury fixed, that that act constituted knowledge that the council of the village of Norwood might undertake under an authority claimed to be derived from the statutes of Ohio, to assess back on her abutting property this purchase price, with costs, of the land condemned, and therefore she is estopped from refusing to pay an assessment or contesting the legality of an assessment levied upon her remaining land to raise the money that the village has paid her for the part taken.

Really this would be an extraordinary doctrine. It was not in the power of the complainant to prevent the village of Norwood from condemning any piece of land that may have belonged to her. To say that when condemnation proceedings are begun and carried to a conclusion, and the title taken by a decree of the court, that the complainant takes the money at her peril depending upon how the municipality may use the land, or get the money to pay for it, is a new application of the doctrine of estoppel.

It will be observed that the statutes of Ohio give a council of a village like Norwood, the option either of levying an assessment on all the taxable real and personal property in the corporation, to pay for the cost of necessary real estate acquired for municipal purpose, see section 2263, or it may undertake, by section 2264, what was attempted in this case, to make the property holder pay back the cost of the real estate taken, by assessing it against her remaining property.

The passage of an ordinance by a village is notice to no one. That is to say, it is not such a judicial notice as will affect property rights. But if it were, it was not in the power of the complainant to resist the condemnation of her property. She could not in that action have pleaded, as a means of defeating it, that the village of Norwood intended or might in the future attempt to make her pay back money so received as the value of her land, by an assessment upon her abutting property.

In an action for condemnation, there is but one issue, namely, the value of the property. How, then, can it be claimed that the complainant below was estopped from resisting this assessment because she might have anticipated that the village of Norwood, through its assessing power as a municipality, conferred upon it by the two sections that I have cited, would undertake to employ the instrumentality of the section of the statute that authorized the village to get the purchase price of her land out of her, by making an assessment upon the remainder of her abutting land?

The case that counsel cites, Tone v. Columbus, 39 Ohio St., 281, is an authority directly against his contention.

Nowhere in this record does it appear that complainant petitioned for any street improvement—that she asked the village council to bring a condemnation proceeding and take her property—that she petitioned it to make a street in it after it had been taken, or that she solicited it to build a street upon it.

It was such acts that the Supreme Court of Ohio in Tone v. City of Columbus held might operate by way of estoppel in some assessment cases. But the court also says

that silence is not to be construed as an acquiescence in subsequent illegal acts, as every citizen has a right to assume that the subsequent acts of a council will be legal, and hence valid.

A portion of this strip had been used as a private driveway, as the husband of the complainant testified, record pages 25 and 26. But there is no pretense that the village of Norwood had ever acquired title by prescription, or that either it or the public had secured an easement in it as a highway of any kind.

And if it had, the beginning of an action by the village to condemn the strip of ground would have been an abandonment of any claim, either by way of a prescriptive title or a license to use by way of easement.

With all deference and respect to the municipality of Norwood and its able counsel, I submit the case would not be any different, if its council after the condemnation proceedings and after the payment of the money to complainant, knowing it to be in her house, had left the council chamber, gone to her dwelling, demanded of her that she give the money back to the town, and refusing to do so, had taken it from her.

Would the counsel contend that if a writ of injunction could have been obtained during the process of this sort of taking, that the council could have answered to the writ that the plaintiff was estopped from enjoining them from taking the money from her, because she might have expected when they condemned her property and paid her for it, that speedily they would have been at her dwelling house

attempting to take it away from her to pay it back into the municipal treasury?

I respectfully submit in conclusion that the judgment of the court below should be affirmed.

CHARLES W. BAKER,
For Appellee.